



May 25, 1999

Mr. George Cato
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756

OR99-1451

Dear Mr. Cato:

You ask whether certain information is subject to required public disclosure under the Texas Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 124518.

The Texas Department of Health (the “department”) received a request for specific licensing and compliance information. You state that certain responsive information has been released.¹ You claim, however, that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

Initially, you argue that many of the submitted documents are excepted from disclosure under section 552.103. Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person’s office or employment, is or may be a party; and

¹We note that you have only submitted documents relating to one health care facility. Therefore, we assume that to the extent other responsive documents exist, those documents have been released to the requestor.

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991).

In this instance, the department has supplied this office with information which shows that an investigation has been conducted, and the department has initiated the litigation process. We additionally find that the documents submitted by the department are related to litigation for the purposes of section 552.103(a).

We note, however, that many of the documents you seek to withhold under section 552.103 were either obtained from or provided to the opposing party in the litigation, and are, therefore, not excepted from disclosure under section 552.103(a). Generally, once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the department has not raised any additional exceptions to disclosure for these documents. Accordingly, any documents obtained from or provided to the opposing party in the litigation must be released to the requestor.² The remaining documents may be withheld under section 552.103.³

Section 552.101 of the Government Code excepts from disclosure "information deemed confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Federal regulations prohibit the release of criminal history record information ("CHRI") maintained in state and local CHRI systems to the general public. See 28 C.F.R. § 20.21(c)(1) ("Use of criminal history record information disseminated to noncriminal justice agencies shall be limited to the purpose for

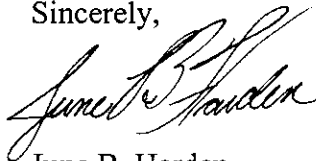
²We caution, however, that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information. Prior to releasing any information, you should ensure that the information is not confidential by law.

³We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Again we caution that confidential information must not be released even after litigation has concluded. See Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

which it was given.”), (2) (“No agency or individual shall confirm the existence or nonexistence of criminal history record information to any person or agency that would not be eligible to receive the information itself.”). Section 411.083 provides that any CHRI maintained by the Department of Public Safety (“DPS”) is confidential. Gov’t Code § 411.083(a). Similarly, CHRI obtained from the DPS pursuant to statute is also confidential and may only be disclosed in very limited instances. *Id.* § 411.084; *see also id.* § 411.087 (restrictions on disclosure of CHRI obtained from DPS also apply to CHRI obtained from other criminal justice agencies). We conclude that some of the submitted documents fall within the ambit of these state and federal regulations and must be withheld. We have marked the information that is not CHRI and must, therefore, be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink, appearing to read "June B. Harden", written in a cursive style.

June B. Harden
Assistant Attorney General
Open Records Division

JBH/ch

Ref: ID# 124518

encl. Marked documents

cc: Mr. Ronnie Harrison
Attorney at Law
1018 Preston Street, Suite 100
Houston, Texas 77002
(w/o enclosures)